Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

(4)

No. 99-323

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD HANOUSEK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

PETER L. GRAY
LAWRENCE S. EBNER*
ROBERT A. MATTHEWS
LAWRENCE J. JOSEPH
MCKENNA & CUNEO, L.L.P.
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500
**Counsel of Record*

Date: October 22, 1999

1818

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE WRIT 6

I. THE CLEAN WATER ACT IS NOT "PUBLIC WELFARE" LEGISLATION 6

A. The Public Welfare Doctrine Always Has Been Limited to Inherently Dangerous Activities For Which the Penalty is Light 6

B. The Ninth Circuit Misapplied The Public Welfare Doctrine To The Clean Water Act 8

1. Punishment for negligent discharges is not light 9

2. The conduct proscribed by the Clean Water Act is not apparent to the average citizen 9

3. The Ninth Circuit's interpretation of "negligently" is not appropriate in the criminal context 12

II. THE IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION REACH BEYOND THE CLEAN WATER ACT 14

A. The Clean Air Act Has A Similar Criminal Provision 14

B. The Ninth Circuit's Decision Will Have a Negative Impact on Environmental Protection 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Morissette v. United States, 342 U.S. 246 (1952) 8

Nye & Nissen v. United States, 336 U.S. 613 (1949) 13

Regina v. Woodrow, 15 M. & W. 404 (Exch. 1846) 7

Staples v. United States, 511 U.S. 600 (1994) 5, 8

United States v. Balint, 258 U.S. 250 (1922) 7

United States v. Dotterweich, 320 U.S. 277 (1943) 12

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) ..... *passim*

United States v. Hitachi America, Ltd., 172 F.3d 1319 (Fed. Cir. 1999) 13

United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) 8, 11

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd*, 904 F.2d 713 (11th cir. 1994) 9

Weitzenhoff v. United States, 35 F.3d 1275 (9th Cir. 1993), *cert. denied sub nom., Mariani v. United States*, 513 U.S. 1128 (1995) 1, 5, 11, 14

Statutes

33 U.S.C. § 1311 ..... 10, 11

33 U.S.C. § 1319(a) 13

33 U.S.C. § 1319(b) 13

33 U.S.C. § 1319(c)(1) 4, 9, 13

33 U.S.C. § 1319(c)(6) 13

33 U.S.C. § 1319(c)(7) 13

33 U.S.C. § 1319(d) 13

33 U.S.C. § 1319(g) 13

33 U.S.C. § 1321(b)(3) 4, 9, 11

33 U.S.C. § 1321(e) 13

33 U.S.C. § 1362(6) 11

33 U.S.C. § 1362(7) 10

42 U.S.C. § 7413(c) 6, 14

Regulations

33 C.F.R. § 328.3 10

40 C.F.R. § 122.2 10

40 C.F.R. § 230.3(t) 10

40 C.F.R. § 302.4, Appendix A 11

Miscellaneous

U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987) 10

U.S. Environmental Protection Agency, *Wetland Identification and Delineation Manual* (1988) 11

United States Sentencing Guidelines, § 2Q1.2 and § 2Q1.3 9

INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts promoting a limited and accountable government, and opposing overreaching by those administrative agencies and courts which act contrary to the plain meaning of the language chosen by Congress in the substantive statutes at issue.

WLF has participated as *amicus curiae* in numerous environmental cases, including those involving criminal application of the Clean Water Act ("CWA"). *See, e.g., Weitzenhoff v. United States*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied sub nom., Mariani v. United States*, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). WLF vigorously opposes the arbitrary use of criminal prosecution, especially where administrative and civil remedies are available to resolve alleged regulatory infractions.

WLF is able to bring a broader perspective to this case than the parties and presents additional reasons why this Court should grant the Petition, including the important issue of whether the Government must prove a defendant's criminal intent to convict the defendant of "negligently violating" the Clean Water Act.

---

[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief.

This brief is being filed with the consent of all the parties. Letters of consent are on file with the Clerk of this Court.

INTRODUCTION AND STATEMENT OF THE CASE[2]

Edward Hanousek, Jr. has petitioned this Court to review his criminal conviction under the Clean Water Act for which he received the *maximum* sentence -- twelve months imprisonment (six months incarceration and six months confinement in a halfway house) and an additional six months of supervised release. WLF urges this Court to grant certiorari, not simply because the conviction and sentence are unconscionable, but because the Ninth Circuit, in affirming Mr. Hanousek's conviction, has set a precedent which violates due process.

In 1994, Mr. Hanousek's employer, the Pacific & Arctic Railway Company ("PARN") hired an independent contractor, Hunz & Hunz ("H&H"), to straighten a 1000-foot section of track on the White Pass & Yukon Railroad line. The operation involved removal of rock outcroppings and disposal of the resulting debris. H&H employees used backhoes to load debris from the operation into rail cars for transport off-site. A petroleum pipeline, not owned or operated by either PARN or H&H, runs adjacent to this section of track. To prevent damage to the pipeline, H&H placed a protective cover (consisting of railroad ties, sand and

---

[2] The facts set forth herein were extracted from the Ninth Circuit's opinion in *United Stated v. Hanousek*, the Petition for Certiorari, and the Petitioner's Opening Brief filed in the Ninth Circuit. Although WLF concurs with Petitioner's Statement of the Case, certain facts merit additional emphasis.

ballast material) over a 300-foot section of the pipeline. In addition, H&H created a work platform of sand and gravel from which the backhoe was operated. According to one of the H&H backhoe operators, the project never required the backhoe to leave the work platform.

Sometime after H&H had commenced working on the project, PARN hired Mr. Hanousek as a "roadmaster" for the White Pass & Yukon Railroad. In this position, one of Mr. Hanousek's responsibilities was overseeing the work being performed by H&H. Hanousek directed *what* work was to be done by H&H, but he did not direct *how* it was to be done. As an independent contractor, it was H&H's responsibility to perform the work in a professional manner.

One evening, an H&H backhoe operator noticed a few rocks laying alongside the track near the pipeline approximately 100 yards from the active work site area. Instead of walking over on foot to move the rocks by hand, the backhoe operator apparently decided it would be easier to move the rocks with the backhoe. Accordingly, the H&H employee drove the backhoe off of the work platform, rumbled 100 yards to the location of the debris, and attempted to sweep the rocks away from the tracks with the backhoe bucket. Unfortunately, the backhoe bucket accidentally struck and cracked an unprotected section of the pipeline, causing a leak. The backhoe operator immediately radioed the pipeline's pump station, and the pipeline was shut down within a few minutes. Nevertheless, witnesses reported seeing a sheen of oil on a nearby Skagway River after the accident.

The H&H backhoe operator did not tell Hanousek about the rock debris, nor ask for guidance on how to clear such debris. Hanousek was not even in the area when the accident occurred. Rather, he was off duty and at home.

Nevertheless, Hanousek was convicted of "negligently" violating the Clean Water Act's prohibition on discharging oil in harmful quantities to "navigable waters," 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3) (1994).

The district court instructed the jury that to find Hanousek guilty, they need only conclude that the discharge was caused by Hanousek's negligent conduct -- defined by the district court as the failure to use reasonable care. It is not clear from the Ninth Circuit's opinion what Hanousek did -- or did not do -- that constituted the negligent act. WLF does not intend to dwell on that troubling question. Rather, WLF's focus is the Ninth Circuit ruling that the Government need only prove ordinary negligence, rather than criminal negligence, to convict Hanousek because the Clean Water Act is "public welfare legislation." *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999).

SUMMARY OF ARGUMENT

The general rule is that to obtain a criminal conviction, the Government must prove beyond a reasonable doubt that the defendant possessed a criminal state of mind -- *mens rea*. But, as the Ninth Circuit notes, the "public welfare doctrine" creates the following exception to this rule: The Government need not prove *mens rea* as an element of a crime where a defendant is involved in an activity which the defendant should know may result in severe damage or injury to public welfare.

Due process, however, must operate as a "governor" of the public welfare doctrine. A fundamental axiom of due process is that ordinary citizens must be given fair warning of what constitutes a criminal offense. Such fair warning is lacking in the case of the Clean Water Act's "negligence" provision. Ordinary citizens do not possess the specialized

knowledge necessary to distinguish lawful from unlawful discharges under the Clean Water Act's complex regulatory framework. Such complexity alone conflicts with the rationale for applying the "public welfare" doctrine -- *i.e.*, the presumption that the actor should know his activity poses a danger to society and is heavily regulated -- and instead warrants application of the general rule that the Government must prove a defendant's criminal intent to sustain a criminal conviction.

The due process limitation on the public welfare doctrine is brought into sharp relief in cases like the present one, where successive acts by independent actors combine to cause the violation. According to the Ninth Circuit, Mr. Hanousek "negligently violated" the Clean Water Act prohibition against discharging oil to navigable waters, notwithstanding that an H&H employee, not Mr. Hanousek, was the party that accidentally discharged the oil. Not only does this holding conflict with the plain language of the Clean Water Act's criminal provision (which applies to the person discharging the oil), but it also runs roughshod over a fundamental tenet of the public welfare doctrine, namely, that *mens rea* may be eliminated only where the defendant stands in a position that "places him in responsible relation to a public danger, such that he should be alerted to the probability of strict regulation." *Staples v. United States*, 511 U.S. 600, 607 (1994). Mr. Hanousek -- a "roadmaster" in charge of railroad tracks -- is not an environmental manager for the pipeline company, nor one whose position even arguably includes environmental responsibilities.

The Court was last presented with the question of whether the Clean Water Act is public welfare legislation in 1994 when the Ninth Circuit's decision in *Weitzenhoff v. United States*, 35 F.3d 1275, was the subject of a petition for writ of certiorari. The Court declined to review the Ninth

Circuit decision affirming a Clean Water Act conviction of the defendant for "knowing" violation without a showing of criminal intent to violate the law. 513 U.S. 1128 (1995) (*sub nom., Mariani v. United States*). Since that time, confusion over whether the Clean Water Act is a public welfare statute has become pronounced. As the petitioner states, the circuits are divided on the issue.

There is now a compelling need for guidance from the Supreme Court. This need is magnified by the fact that similar criminal provisions are found in other, equally far-reaching statutes, such as the Clean Air Act, 42 U.S.C. § 7413(c). Without the Court's guidance, we risk criminalizing conduct that, to the average citizen, would not be perceived as criminal. One need not conjure up a parade of horribles to illustrate the danger. It cannot get much worse than the facts of this case.

REASONS FOR GRANTING THE WRIT

I. THE CLEAN WATER ACT IS NOT "PUBLIC WELFARE" LEGISLATION

A. The Public Welfare Doctrine Always Has Been Limited to Inherently Dangerous Activities For Which the Penalty is Light

The antecedents of the public welfare doctrine are interwoven with the rise of the industrial age, which transformed a primarily agrarian society into one dominated increasingly by mechanization and dependence on care expected of third parties. That transformation had benefits, but also costs. Society faced new dangers, which the laws were ill equipped to prevent -- tainted foods could be packaged and quickly delivered to a large number of people;

water poisoned with *e coli* bacteria could be piped to an unsuspecting public.

The earliest cases to articulate the public welfare doctrine come from the English courts. For example, in *Regina v. Woodrow*, 15 M. & W. 404 (Exch. 1846), a criminal action was brought against a tobacco dealer to enforce a forfeiture of £200 for possessing adulterated tobacco. The Court of Exchequer held the respondent liable even though he proved that he had purchased the tobacco as genuine, and "had no knowledge or cause to suspect" that it was not so. "It is very true," said Baron Parke, "that it may produce mischief because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so." The penalty in *Regina v. Woodrow* involved *no* possibility of imprisonment, the prohibited conduct caused a very direct and widespread public annoyance, and the existence of a *mens rea* was peculiarly difficult if not impossible for the state to prove.

Seventy-six years later, this Court carved out the same exception to the otherwise applicable rule that proof of criminal intent is a prerequisite to criminal conviction. In *United States v. Balint*, 258 U.S. 250 (1922), the Court held that the Government did not have to prove *men rea* to convict a defendant of selling opium without a registration required under the Narcotics Act of 1917: "[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells." *Id.* at 252-53.

This Court's articulation of the doctrine has not materially changed since that time, except to clarify that a defining characteristic of public welfare legislation is that the criminal offense typically involves little or no imprisonment. *See, e.g. Morissette v. United States*, 342 U.S. at 256 (1952) ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"); *Staples v. United States*, 511 U.S. 600, 616, 618 (1994) ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement"). *See also United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

B. The Ninth Circuit Misapplied The Public Welfare Doctrine To The Clean Water Act

The "negligent violation" provision of the Clean Water Act does not fit the profile of public welfare legislation. The potential punishment for criminal violations is *anything* but light; and the materials and activities subject to regulation are *not* of a nature that one should be presumed to be aware. More fundamentally, the public welfare doctrine's rationale for eliminating the *mens rea* requirement does not apply to the present case where the defendant is not the party handling a dangerous substance or engaging in a dangerous activity. Under such circumstances, it is indefensible to presume the requisite intent on the part of this defendant.

1. Punishment for negligent discharges is not light.

Under the criminal enforcement provisions, a first offender who "negligently violates" any of the many substantive requirements of the Clean Water Act may be fined $25,000 per day per violation and imprisoned for up to one year. 33 U.S.C. § 1319(c)(1). For second violations, the maximum penalty is $50,000 per day and up to three years imprisonment. Thus, with felony-length sentences possible, one could hardly characterize the punishment for violations as light.

The possibility of a lengthy sentence for a minor violation of the Clean Water Act is not merely theoretical. Under the United States Sentencing Guidelines, § 2Q1.2 and § 2Q1.3, first offenders are routinely sentenced to lengthy prison terms for minor regulatory offenses that do not perceptibly threaten human health. For example, in *United States v. Mills*, a father and son were sentenced to prison for 21 months for placing clean building sand on a quarter-acre lot that EPA deemed to constitute a wetland. 817 F. Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd*, 904 F.2d 713 (11th Cir. 1994). In short, by any standard the punishments meted out under the Clean Water Act are severe in proportion to the harm caused by the offense and the culpability of the defendant.

2. The conduct proscribed by the Clean Water Act is not apparent to the average citizen.

The reach of the Clean Water Act is so broad that only an environmental expert could be expected to distinguish between lawful and unlawful discharges. Two CWA requirements subject to criminal punishment illustrate

the point, specifically: (1) the prohibition against the discharge of "pollutants" to "navigable waters" without a CWA permit (33 U.S.C. § 1311); and (2) the prohibition against the discharge of oil and "hazardous substances" to "navigable waters" (33 U.S.C. § 1321(b)(3)) (the provision allegedly violated by Mr. Hanousek). The seemingly simple phrases used in these two CWA prohibitions belie a complex, ever-changing maze of regulation that has created decades of work for thousands of environmental lawyers and consultants.

Under the Clean Water Act, "navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). EPA and the United States Army Corps of Engineers (the "Corps"), which share regulatory authority under the Clean Water Act, each have promulgated regulations broadly defining "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce." *See* 40 C.F.R. § 122.2 (EPA definition); 33 C.F.R. § 328.3 (Corps definition).

Many of the terms used in the EPA/Corps definition of "waters of the United States" also have been defined expansively, such as the term "wetland." Under EPA and Corps regulations, the term "wetland" encompasses dry land that supports "vegetation typically adapted for life in saturated soil conditions" ("hydrophytic vegetation"). *See* 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b). Identifying "hydrophytic vegetation" is so complicated that in 1987 the Corps published a several-hundred page manual to "ensure

consistent regulation of wetlands."[3] One year later, EPA published its own procedures for identifying and delineating wetlands.[4]

Similar complexities abound in identifying the "pollutants" for which one must obtain a permit before discharging to "navigable waters" (33 U.S.C. § 1311). The "pollutants" that one may not discharge without a permit include far more than simply "obnoxious waste materials" (quoting from *Int'l Minerals*, *supra*) that pose patent dangers to water quality. Indeed, the term "pollutant" is defined so broadly that virtually *anything* one discharges to "waters of the United States" requires a permit.[5] As the five dissenting judges in *United States v. Weitzenhoff* observed, one could violate the Clean Water Act prohibition on unpermitted discharges of "pollutants" simply by "skipping a stone into a lake" or "pouring hot stale coffee down the drain." 35 F.3d at 1298.

It is no easier to identify "hazardous substances" the discharge of which is absolutely prohibited (33 U.S.C. § 1321(b)(3)). The list of "hazardous substances" subject to the absolute discharge prohibition under the Clean Water Act is populated with substances that few would regard as inherently dangerous or hazardous -- *e.g.*, copper

---

[3] U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987).

[4] EPA, *Wetland Identification and Delineation Manual* (1988).

[5] The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

and nickel. *See* 40 C.F.R. § 302.4, Appendix A. Complicating matters further, EPA has amended the list countless times. Environmental professionals spend considerable time tracking such changes and modifying corporate compliance procedures as appropriate.

Not even an environmental professional could be expected to know all of the nuances of the Clean Water Act, much less a layman like Mr. Hanousek.

3. The Ninth Circuit's interpretation of "negligently" is not appropriate in the criminal context.

Perhaps the most troubling aspect of the Ninth Circuit's decision is the notion that an individual can be criminally prosecuted for "negligently" discharging a regulated substance where the individual is not the party that discharged or directed the discharge of the substance. Rather, under the Ninth Circuit holding, anyone can be imprisoned for a negligent act or omission which, in combination with another's subsequent negligent act, causes a discharge of a regulated substance. That means that someone like Mr. Hanousek, a "roadmaster" who is far removed the world of "hazardous substances," "pollutants," and "navigable waters," goes to jail if he makes a mistake which is ruled to be a proximate cause of a prohibited discharge. Such a construction impermissibly cleaves apart the criminal act -- "negligently violates" -- from the actor ("Any person who") in a way that Congress could not have intended.

In previous cases where this Court has held an individual criminally liable for an offense in which the individual did not directly participate (*e.g.*, shipping or labeling adulterated drugs), the Court relied on the theory that one who aids and abets a violation is as guilty as the

principal. *See United States v. Dotterweich*, 320 U.S. 277, 281, 284 (1943) (holding corporate officer liable for aiding and abetting a violation). Negligent supervision of a subcontractor whose subsequent negligence violates the Clean Water Act does not constitute "aiding and abetting" the violation. *See Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949) ("[T]o aid and abet another to commit a crime, it is necessary that a defendant must 'participate in it as in something he wishes to bring about, that he seek by his action to make it succeed'") (citations omitted). *See also United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1337 (Fed. Cir. 1999) (holding that one cannot negligently aid and abet a negligent violation through mere contributory negligence).

In sum, the Ninth Circuit's application of the "public welfare doctrine" to the Clean Water Act "negligent violation" provision violates due process. The Government must prove more than ordinary negligence on the part of a defendant to obtain a criminal conviction.[6]

---

[6] Lest there be any concern that polluters will run rampant without the threat of criminal conviction based on an ordinary negligence standard, the Clean Water Act's elaborate civil enforcement scheme forecloses that scenario. EPA may prosecute CWA violators through any of three possible mechanisms: (1) EPA may seek administrative penalties of up to $10,000 per day per violation in a hearing before an administrative law judge (33 U.S.C. §§ 1319(g) and 1321(c)(6)); (2) EPA may seek civil penalties of up to $25,000 per day per violation in federal district court (33 U.S.C. §§ 1319(d) and 1321(c)(7)); and (3) EPA may issue administrative orders ("cease and desist orders") or pursue injunctive relief in federal district court (33 U.S.C. §§ 1319(a), (b) and 1321(e)).

II. THE IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION REACH BEYOND THE CLEAN WATER ACT

A. The Clean Air Act Has A Similar Criminal Provision

The implications of *United Stated v. Hanousek* are not limited to the Clean Water Act. The Clean Air Act also contains criminal enforcement provisions, which punish individuals for negligent conduct. Specifically, any person who "negligently releases into the ambient air any hazardous air pollutant" and thereby "negligently places another person in imminent danger" may be imprisoned for up to one year. For second offenses, the maximum punishment is two years. *See* 42 U.S.C. § 7413(c)(4).

Criminalizing ordinary negligence under the Clean Air Act would violate due process for the same reasons that criminalizing ordinary negligence under the Clean Water Act violates due process -- namely, the penalties are severe, the conduct proscribed is not readily understood by the average citizen, and one need not even be the "releaser" to be guilty.

B. The Ninth Circuit's Decision Will Have a Negative Impact on Environmental Protection

In addition to incorrectly presuming knowledge of a complex regulatory scheme by an individual whose position does *not* "place him in responsible relation to a public danger" (*i.e.*, environmental damage), the *Hanousek* decision sends a troubling message to those charged with environmental management.

The pervasiveness and complexity of environmental regulation has created an expression among the

environmental managers whose job is to ensure their employer complies with those regulations: "Be a manager, go to jail." If *United States v. Hanousek* is allowed to stand, this gallows humor comes frighteningly close to being the truth. To paraphrase the dissent in *United States v. Weitzenhoff*, it would impose on these vitally important protectors of the environment a massive legal risk, unjustified by law or precedent. 35 F.3d at 1298. Do we enhance environmental protection by incarcerating citizens for a simple error in judgment? Or does such a prosecution actually undermine environmental protection by setting the threshold for criminal conduct so low that we will discourage people from serving in a corporate environmental capacity?

CONCLUSION

For the foregoing reasons, and those discussed in the Petition for a Writ of Certiorari, the Court should grant review.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

PETER L. GRAY
LAWRENCE S. EBNER*
ROBERT A. MATTHEWS
LAWRENCE J. JOSEPH
MCKENNA & CUNEO, L.L.P.
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500
Counsel of Record